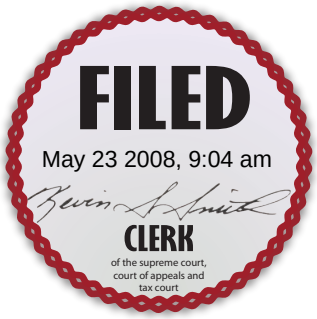

ATTORNEYS FOR APPELLANT:

DAVID C. VAN GILDER
ANDREW P. SIMMONS
Van Gilder & Trzynka, P.C.
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ABRA KATTERHENRY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0708-CV-383
	)	
HARTLAND REAL ESTATE,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Jerry L. Ummel, Magistrate
Cause No. 02D01-0605-SC-8487

May 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Abra Katterhenry ("Katterhenry") appeals the denial of an Indiana Trial Rule 60(B) motion to set aside a default judgment obtained by Hartland Real Estate ("Hartland"). We reverse.

Issue

Katterhenry presents two issues for review, which we consolidate and re-state as a single issue: whether the trial court abused its discretion in denying Katterhenry's motion to set aside the default judgment.

Facts and Procedural History

On January 28, 2006, Katterhenry leased from Hartland an apartment located at 1731 Main Street in Fort Wayne. The lease term was for six months and commenced on February 1, 2006. The checks for the security deposit and first month's rent were drawn on the account of Katterhenry's mother, Philipa Katterhenry ("Philipa") and reflected Philipa's Huntertown address. Philipa's Huntertown address was Katterhenry's alternative address.

Upon taking possession of the apartment, Katterhenry discovered that it lacked a source of heat and that the gas stove was inoperable. At some point, Hartland installed an electric stove and electric space heaters, which were the sole means to heat the apartment. On April 13, 2006, a City of Fort Wayne Neighborhood Code Enforcement officer inspected the apartment house and determined it was "unfit for human occupancy." (App. 6.) Because of an improper hot water heater connection and the illegality of using space heaters as a primary source of heat, the City of Fort Wayne issued a "condemn and vacate" order. (App.

18.) Code enforcement personnel posted notices and informed residents that they needed to vacate the premises.

On April 20, 2006, Hartland sent a letter to Katterhenry, claiming that deficiencies had been corrected and Katterhenry need not vacate the apartment. On April 22, 2006, Hartland manager John McKay visited the apartment and discovered that Katterhenry was moving out. Katterhenry did not return the key to McKay.

Two days later, the "condemn and vacate" order was lifted. By this time, Katterhenry had stopped payment on one or more rent checks. On April 24, 2006, Hartland sent Katterhenry a letter advising her that she was still liable on the lease.

On May 1, 2006, Hartland filed a notice of claim for immediate possession and for damages. A copy of the Notice of Claim was left at the abandoned apartment. A copy mailed to the abandoned apartment was returned as unclaimed. The Allen Superior Court, Small Claims Division, conducted a hearing on May 26, 2006, at which Katterhenry was not present. Hartland was granted immediate possession of the apartment. On June 26, 2006, the trial court conducted a hearing on damages, at which Katterhenry was not present. Katterhenry was assessed damages of $1,050.

In the course of proceedings supplemental, Hartland conducted a skip trace and located Katterhenry at Philipa's Huntertown address. This was the same address appearing on the checks used to make payments to Hartland.

On February 21, 2007, Katterhenry moved to set aside the default judgment against her. A hearing was conducted on June 26, 2007, and Katterhenry was denied relief.[1] This appeal ensued.

Discussion and Decision

Katterhenry claims that the trial court erroneously refused to set aside the default judgment against her, because she established her grounds for relief under Trial Rule 60(B) by showing surprise due to lack of service and also showing, prima facie, a meritorious defense.

When, as here, an appellee fails to submit a brief, an appellant may prevail by making a prima facie case of error. Rzeszutek v. Beck, 649 N.E.2d 673, 676 (Ind. Ct. App. 1995), trans. denied. The prima facie error rule protects this Court and relieves it from the burden of controverting arguments advanced for reversal, a duty that properly remains with counsel for the appellee. Id.

In the trial court, Katterhenry as the movant for relief from a default judgment bore the burden to show sufficient grounds for relief under Trial Rule 60(B). Mallard's Pointe Condo. Ass'n, Inc. v. L & L Investors Group, LLC, 859 N.E.2d 360, 365 (Ind. Ct. App. 2006), trans. denied. A party seeking to set aside a default judgment must demonstrate that the judgment was entered as a result of mistake, surprise, or excusable neglect. Walker v. Kelley, 819 N.E.2d 832, 836 (Ind. Ct. App. 2004). Additionally, the moving party must make a prima facie showing of a meritorious defense. Id. at 837. A meritorious defense is

[1] On November 19, 2007, the trial court certified a Statement of the Evidence summarizing the evidence presented at the June 26, 2007 hearing.

one demonstrating that, if the case were retried on the merits, a different result would probably ensue. Id.

Generally, default judgments are not favored in Indiana, because it is the policy of this State that courts decide a controversy on its merits. Id. The trial court is required to balance the alleged injustice suffered by the moving party against the interests of the winning party and society's interest in general in the finality of litigation. Id. We review the decision for an abuse of discretion and will not reweigh the evidence or merely substitute our judgment for that of the trial court. Id. at 836. However, any doubt as to the propriety of a default judgment is resolved in favor of the defaulted party. Id. at 837.

Here, Katterhenry claimed that she did not receive the Notice of Claim left at the residence she had vacated. Hartland did not dispute this claim. Admittedly, Hartland knew that Katterhenry had vacated the condemned premises. Also, Hartland did not dispute the existence of the alternative address on the checks received. Hartland simply did not utilize the alternative address until proceedings supplemental were commenced. Thus, Katterhenry established that the entry of the default judgment was a surprise to her.

As to the existence of a meritorious claim, it is also undisputed that Katterhenry was ordered to vacate the apartment because it was uninhabitable. Hartland claimed the deficiencies were corrected. However, there is no evidence that the order to vacate was lifted before Katterhenry moved out. Defendant's Exhibit C, McKay's letter to Katterhenry dated April 20, 2006, provided in relevant part:

> [T]he Neighborhood Code Enforcement Department inspected the property today, and passed on the corrections I made to the property. These corrections addressed the violations detailed in their Condemnation Notice that all the tenants and I received. The property will not be condemned, and you will not need to vacate.
> I have asked the Neighborhood Code Enforcement Department to send each tenant a notice regarding the passing of this inspection, and a disregarding of the Condemnation Notice.

(App. 19.) (emphasis added.) As such, the evidence established that Katterhenry moved out in response to a condemnation order and, as of that date, Hartland had made certain corrections and hoped for a rescission of the condemnation order, but the rescission had not yet been procured.

Leaving an apartment in response to a condemnation order for lack of habitability raises a meritorious defense to an action for the payment of rent. See Indiana Code Section 32-31-8-5 (requiring that a landlord "deliver the rental premises to a tenant in compliance with the rental agreement, and in a safe, clean, and habitable condition.") See also Geels v. Dunbar, 812 N.E.2d 857, 861 (Ind. Ct. App. 2004) (affirming a judgment returning the deposit and awarding attorney's fees to tenants who took possession of an uninhabitable apartment), trans. denied.

Conclusion

Katterhenry has made a prima facie showing of trial court error and Hartland has failed to file an appellee's brief. Therefore, Katterhenry is entitled to have the default judgment against her set aside.

Reversed.

FRIEDLANDER, J., and KIRSCH, J., concur.